IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted
Suitable for Publication

AT MELBOURNE
CRIMINAL JURISDICTION

CR-17-01507

DIRECTOR OF PUBLIC PROSECUTIONS

v

BRENDAN HARTY

JUDGE:	HIS HONOUR JUDGE LACAVA
WHERE HELD:	Melbourne
DATE OF HEARING:	22 January 2018
DATE OF SENTENCE:	15 March 2018
CASE MAY BE CITED AS:	DPP v Harty
MEDIUM NEUTRAL CITATION:	[2018] VCC 298

REASONS FOR SENTENCE

Subject: Obtain Financial Advantage by Deception x 10 (Commonwealth)

Sentence: 7 years' imprisonment / 4 years, 3 months non-parole.

APPEARANCES:	Counsel	Solicitors
For the Director of Public Prosecutions	Ms K. Hands	
For the Accused	Mr B. Johnston	

1 HIS HONOUR: Brendan James Harty, you have pleaded guilty to ten charges of obtaining a financial advantage by deception contrary to s.134.2(1) of the *Criminal Code of the Commonwealth*, Charges 1 to 9 and 12. The maximum penalty for each of these offences is imprisonment for ten years. You have also pleaded guilty to one charge of attempting to obtain a financial advantage by deception contrary to sub-s.11.1(1) and 134.21 of the *Criminal Code of the Commonwealth*, Charge 10, and one charge of obtaining a financial advantage by deception contrary to s.82(1) of the *Crimes Act 1958* - Victoria, Charge 11. The maximum penalty for each of these offences is also imprisonment for ten years.

2 At the time that you pleaded guilty to these offences you also admitted prior convictions for dishonesty. On 9 October 2001 you were sentenced in this court to a total effective sentence of two years and nine months imprisonment with a non-parole period fixed at 20 months on charges of theft and obtaining a financial advantage by deception. That sentence related to 33 charges resulting from your offending between March 1998 and May 1999. You were released from custody after serving that sentence on 31 May 2003.

3 The offending for which I must sentence you occurred between October 2013 and March 2016, a period of about two and a half years. There was a gap of about 15 years when you committed no criminal offences. The circumstances of your offending are summarised in a lengthy prosecution opening prepared for the plea. It comprises some 20 pages and was summarised in open court by the prosecutor, Ms Hands. Your counsel, Mr Johnston, accepted the summary was accurate for the purposes of sentencing you. It is not necessary that I here repeat in full that which is contained in the summary and will do so only in an abbreviated way. These sentencing remarks need to be read however in conjunction with the prosecution opening.

4 Your offending occurred in the course of your work as a qualified accountant

and a registered tax agent. You conducted an accountancy practice known as HD Accountants in Kew where you specialised in the provision of taxation services to clients, including preparation and lodgement of business activity statements and annual income tax returns.

5 As a tax agent registered with the Australian Taxation Office, the ATO, you had access via the internet to the ATO's tax agent portal. Via this means you could lodge BAS statements and income tax returns electronically with the ATO on behalf of clients. You could also update client registration details with the ATO, including the financial institutions and bank account details into which refunds for clients could be deposited by the ATO electronically.

6 Charges 1 to 9 inclusive are each rolled up charges. In Charge 1 between October 2013 and May 2014 you lodged eight false BAS statements with the ATO in the result that you obtained $12,737 from the ATO purporting to be on behalf of clients. In Charge 2 between January and March 2015 you lodged eight false BAS statements with the ATO in the result that you obtained $16,222 from the ATO purporting to be on behalf of clients. In Charge 3 between April and June 2015 you lodged 26 false BAS statements with the ATO in the result that you obtained $103,946 from the ATO purporting to be on behalf of clients. In Charge 4 between July and September 2015 you lodged ten false BAS statements with the ATO in the result that you obtained $37,371 from the ATO purporting to be on behalf of clients.

7 In Charge 5 between October and December 2015 you lodged 24 false BAS statements with the ATO in the result that you obtained $91,894 from the ATO purporting to be on behalf of clients. In Charge 6 between January and March of 2016 you lodged 33 false BAS statements with the ATO in the result that you obtained $243,082 from the ATO purporting to be on behalf of clients. In Charge 7 between April and August 2016 you lodged 17 false BAS statements with the ATO in the result that you obtained $112,603 from the ATO purporting

to be on behalf of clients.

8 In Charge 8 between November 2014 and August 2016 you lodged 12 false income tax returns for entities associated with you and family members with the ATO in the result that you obtained $111,007 from the ATO purporting to be on behalf of those entities and family members.

9 In Charge 9 between January 2015 and February 2016 you lodged ten false income tax returns for entities associated with you and family members with the ATO in the result that you obtained $139,149 from the ATO purporting to be on behalf of those entities and family members.

10 In Charge 10 between April 2015 and July 2016 you lodged a false BAS statement with the ATO purportedly on behalf of a client which claimed a refund of GST of $46,029, but the BAS was queried by the ATO and your attempt to obtain a refund on the basis of a false BAS statement failed.

11 In Charge 11 a client transferred into an account controlled by you the sum of $37,477 for the purpose of paying a superannuation liability owed by the client to the ATO. You did not pay that money to the ATO, but used it for yourself, leaving the client indebted to the ATO. This gives rise to the offence under the Crimes Act 1958 - Victoria.

12 In Charge 12 on 9 March 2016 you lodged two false BAS statements purporting to be on behalf of a client with the ATO in the result that you obtained tax credits for the client valued in total of $7,149 from the ATO.

13 Apart from the occasions when the false BAS statements or taxation returns were lodged with the ATO on behalf of entities controlled by you in each instance the false documents were lodged without the knowledge of your clients. The total amount of the financial advantage derived by you from all of the charges over a protracted period of two years and ten months was

$958,666. It involved the falsification of a large number of documents and the making of a large number of false representations.

14 Your offending was a gross breach of trust carried out against the ATO from your position as a registered tax agent and to exploit the relationships with clients and your knowledge of their financial circumstances. In some instances you breached the trust of family members. Your fraud also involved you falsely appointing yourself as a director of several companies which enabled you to fraudulently access bank accounts to reap the rewards of your fraud. That was because you did not operate a trust account and you were not authorised to receive money on trust for clients from the ATO. Such conduct is difficult to detect and trace and involves a lot of work to unravel. I regard your offending as being relatively sophisticated and planned, although it must be said you were bound to be caught. What you did it affected the financial affairs of so many clients and companies, but sooner or later questions would be asked about the financial irregularities that you created, and that is what happened. No doubt you caused trouble for clients who no doubt had to unravel the mess your conduct had left them in so far as the ATO was concerned.

15 In sentencing you for the Commonwealth offences I must have regard to the matters contained in Part 1B of the *Crimes Act* 1914 of the Commonwealth, and particularly the non-exhaustive list of matters set out in s.16A(2) of that Act. In passing sentence upon you I have had full regard to these matters. Importantly for you and to your credit you have pleaded guilty to the charges and you indicates that you would do so at the first available opportunity.

16 You were interviewed by investigators from the ATO under caution on 25 October 2016 and you were fully cooperative with the investigators and you made full admissions and fully explained what you had done. This made their task much easier and saved the cost of a lengthy, complicated and costly

investigation. When interviewed you told investigators that you were motivated to offend as you did by a gambling habit. I will return to this later. This provides both the context and explanation for your offending, but it does not excuse it. Because you have pleaded guilty you have saved the time and cost of what might have been a lengthy and costly trial involving many witnesses. Because you have pleaded guilty you are entitled to a reduction in the sentence that you will receive because of your plea and this will be reflected in the sentence that I will shortly pass. Further, I treat your guilty pleas as evidence in genuine remorse on your part for your crimes.

17 The prosecutor submitted, and your counsel did not dispute, that I must impose a sentence of immediate imprisonment and fix a non-parole period. Your offending is very serious. Offending of this kind attacks public revenue. In cases such as this the purposes of sentencing must have proper regard to deterrence both general and in your case specific, denunciation, just punishment and your prospects for rehabilitation.

18 The prosecution provided a helpful written submission on sentence which I marked as Exhibit B. That submission emphasised the serious nature of your offending and the need for the sentence I impose to have proper regard to the principle of deterrence, both general and specific, to be reflected in the sentence that I pass. I did not understand your counsel to take issue with any of the legal principles addressed by the prosecution's submissions.

19 Your counsel, Mr Johnston, provided a helpful written outline of submissions on your behalf and I borrow from it. You were born on 25 April 1963. You are approaching 55 years of age. When this offending occurred you were aged between approximately 50 and 53 years. When your first episode of offending occurred you were aged between 35 and 36 years. You are married with three grown children. You have a good family and enjoy their full support, despite the fact that you have again offended. Your family were in court to

support you on your plea. Your mother is living in Ballarat and you have five siblings who also continue to support you.

20 You were born and educated in Ballarat and you graduated with a Bachelor of Commerce degree from Melbourne University. You have almost always been gainfully employed and have a good work ethic. I was told and accept that your offending for which you were sentenced in this court in 2001 occurred in the context of a long term gambling addiction. It is the explanation for this offending also.

21 After you were released from prison in May 2003 you completed parole satisfactorily, but you were left with considerable debt. You soon returned to work in accounting in the belief that you had overcome your gambling addiction. You are said to have struggled to maintain long term employment because employers became aware of your prior convictions for dishonesty.

22 In 2011 you gained employment in HD Accountancy in Kew and because of circumstances that developed you assumed ownership of that firm and became a registered tax agent having disclosed your prior criminal history to the Registration Board. This offending commenced the following year. At first you only used your own identity to facilitate deceptions, but no doubt buoyed by the fact you had temporarily at least escaped detection by 2014 your offending escalated whereby you falsified documents in the names of clients and family members. By then you appear to have been out of control. You were apparently of the belief that an enormous win was just around the corner and you would be able to pay back everything. You would bet on anything through online betting conducted by Sportsbet and Ladbrokes.

23 I was told and accept that after you were released from prison in 2003 your wife controlled the family finances for the first ten years, depriving you of the opportunity to gamble. When you took over the accounting firm that

monitoring or control by your wife ceased and your gambling occurred online and in private without your family knowing. I accept the money has been lost to gambling and that there is no evidence that you were motivated to commit crimes to finance a lavish lifestyle. I also accept that you are remorseful for your conduct.

24 I was told and accept that you have not gambled since August 2016 and that you have taken steps to address your gambling addiction attending Gamblers Anonymous meetings. Since your arrest you have continued to work at a city club and your wages are paid into your wife's account so that you cannot control the money. I accept that your offending in these charges and their aftermath will have a devastating effect upon your family.

25 I was told and accept that you intend to study to work in building upon your eventual release from prison. I was told and accept that your sister also had a gambling addiction and she sadly suicided in 2012.

26 Your counsel appropriately conceded that these are serious examples of what are serious offences that occurred in the context of gambling addiction. He conceded that there was a degree of sophistication in your offending and that it was prolific and protracted and the amount of financial gain to you was very significant. He also conceded that your offending constituted an abuse of trust. These concessions were appropriately made. Mr Johnston submitted that the real issue raised by this plea is totality, and I accept that to be the case.

27 I received into evidence as Exhibit 3 the psychological report related to you from Stephen Gault, a clinical psychologist. You expressed appropriate remorse to him and you told him of the failed attempt at suicide in August of 2016 when you attempted to drown yourself. He gave the opinion you suffer from a gambling disorder in sustained remission. He thought you do not

suffer from mental impairment and you have no history of treatment for mental disorder of any kind. He also gave the opinion you did not present with symptoms of depression, whilst noting that gambling disorder is commonly associated with major depression.

28 As to rehabilitation Mr Gault said inter alia at paragraph 63, quote:

> "In my opinion the fact that he relapsed into pathological gambling under stressful circumstances after such a long period of abstinence indicates that he must always be considered at risk of relapse under similar circumstances in the future."

I accept those opinions.

29 I also received into evidence references relating to your from Darren Rosti and Father Zammit. Both speak highly of you as a good and decent person. In passing sentence I have had regard to these references. In my judgment your prospects for rehabilitation must remain guarded. I think it likely that you will reoffend if you find yourself in a position of trust with the opportunity to falsify documents to get money as you did in this offending and in your previous offending. Your best prospects for a full rehabilitation is to ensure that you deny yourself of such opportunities upon your release. I am sure your family will keep a watchful eye over you upon your eventual release from prison to ensure you do not work in a situation to provide you with an opportunity to obtain money by dishonest means for gambling.

30 On the plea it was conceded that the only sentence that I should properly impose in your case was a sentence that provides for immediate imprisonment and to fix a non-parole period. Your counsel asked that I have proper regard to the principle of totality in sentencing and not impose upon you a crushing sentence.

31 On Charge 1 you are convicted and sentenced to a term of imprisonment of 12 months.

32 On Charge 2 you are convicted and sentenced to a term of imprisonment of 12 months.

33 On Charge 3 you are convicted and sentenced to a term of imprisonment of two years.

34 On Charge 4 you are convicted and sentenced to a term of imprisonment of 18 months.

35 On Charge 5 you are convicted and sentenced to a term of imprisonment of two years.

36 On Charge 6 you are convicted and sentenced to a term of imprisonment of three and a half years.

37 On Charge 7 you are convicted and sentenced to a term of imprisonment of 12 months.

38 On Charge 8 you are convicted and sentenced to a term of imprisonment of 12 months.

39 On Charge 9 you are convicted and sentenced to a term of imprisonment of 18 months.

40 On Charge 10 you are convicted and sentenced to a term of imprisonment of six months.

41 On Charge 11 you are convicted and sentenced to a term of imprisonment of six months.

42 On Charge 12 you are convicted and sentenced to a term of imprisonment of six months.

43 I direct that the sentences imposed on Charges 1, 2, 6, 7, 8, 9, 10 and 12 commence immediately upon the completion of the sentence imposed on Charge 11, the state offence. I further direct that the sentence imposed on Charges 3 and 4 commence immediately upon the completion of the sentence imposed on Charge 6. I further direct that the sentence imposed on Charge 5 commence one year after the commencement of the sentence imposed on Charge 3, making a total effective sentence of seven years imprisonment.

44 I direct that you serve a minimum term of four years and three months of the Federal sentences passed this day before being eligible for release on parole. After taking into account the sentence on the state offence of six months to be first served it will mean that you will serve an actual minimum term of four years and nine months.

45 For the purposes of s.6AAA of the *Sentencing Act* Victoria I state that had it not been for your pleas of guilty to the charges I would have imposed a total effective sentence of ten years and I would have fixed a non-parole period of seven years before you would have been eligible for release on parole. I declare that there have been 52 days pre-sentence detention under the sentences passed this day and direct that 52 days be reckoned as having been already served be entered into the records of the court and be deducted administratively.

46 I have been asked to sign a reparation order of the Commonwealth of Australia in the sum of $875,160 and a compensation order to the Commissioner of Taxation in the sum of $37,477 relating to Charge 11. The making of those orders was not opposed and I have signed them. I have had regard to the fact that I will sign those orders in fixing the terms of imprisonment that I have on all of the charges.

47 Are there any questions arising out of that?

48 MR JOHNSTON: No, Your Honour.

49 MS HANDS: No, Your Honour.

50 HIS HONOUR: Very well.

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